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Current Topics.

Solicitors and the Stock Exchange.

ON 10th March the Stock Exchange Committee confirmed the various proposals for the reform of the London and Provincial Stock Exchanges contained in the circular recently issued to members of the London Stock Exchange, to which reference was made in this journal on the 22nd February (85 SOL. J. 85). There was, however, a significant exception, as confirmation of three forms of application to be placed on registers of agents with whom brokers may share their commission was deferred until 17th March. It was generally understood that this postponement was for the purpose of giving further consideration to the amounts of the fees set out on the forms. It will be remembered that it had been proposed to raise the annual fee for those applying to be put on the general register to £10 10s. Many solicitors who pass on business do not receive as much as £10 10s. a year in commission, and a shrewd forecast was made in *The Financial Times* of 13th and 17th March, that as this might prove a serious obstacle to small law firms and others who might otherwise seek registration, the fee might be substantially reduced when the matter came up for further consideration by the London Stock Exchange Committee. In our previous comment on this subject on the 15th March (85 SOL. J. 122) we referred to the solicitor's paramount duty to his client in selecting securities for investment. The discharge of this duty, however, might well be thwarted through no fault of his own if he is to bear any extra burden of expense in selecting a particular investment as a result of an increase in the registration fee. A further matter for consideration has been put forward by a correspondent with regard to the reduction of the rate of rebate from 33⅓ per cent. to 25 per cent. He points out that a solicitor's office expenses which were in normal times up to 50 per cent. of his gross profit now exceed this, and he must, therefore, earn £84 before clearing his yearly fine. Such business as a solicitor would rightly reject would go to the banks and the brokers would have to pay 33⅓ per cent. instead of 25 per cent. The real remedy, in the view of our correspondent, would be to make it illegal to allow any commission, whether to banks, accountants, solicitors, or anyone else. The banks, however, would obviously not accept this suggestion, as they obtain a large proportion of the volume of trustee business in the country. At the meeting on 17th March it was decided to fix the annual fee for general agents at £5 5s., and this concession should go some way towards meeting criticism.

Payment into Court.

IN a letter to the Editor at p. 152 of this issue it is suggested that the time has arrived when the rule with regard to non-disclosure of payment into court either on the pleadings or to the judge or jury at the trial of an action in the High Court should be abolished (R.S.C., Ord. 22, r. 6). The old rule (Ord. 22, r. 22) merely prohibited disclosure of the fact of payment into court to a jury, where there was a trial by judge and jury. The new rule, which was substituted in 1933, provides that except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into court under the preceding rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and the amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment. The purpose of the rule, as FARWELL, J., observed in the Court of Appeal in *Millensted* v. *Grosvenor House (Park Lane), Ltd.* [1937] 1 K.B. 717, 727, was to prevent the premature disclosure of a fact which was not relevant to the issues to be tried, but the disclosure of which might prejudice one or more parties to the proceedings. Even when the rule applied only to jury trials it was bitterly attacked. LORD RUSSELL OF KILLOWEN, C.J., in *Klamborowski* v. *Cooke*, 14 T.L.R. 88, said that in his opinion the rule was a very foolish one and worked very inconveniently, and he himself told the jury that the defendant had paid £5 into court. That there is another view is obvious from *Millensted's Case*, *supra*, where even FARWELL, J., who was well aware of the effect of the new rule on Chancery proceedings, gave it his unqualified approval, as excluding irrelevant evidence. He added, however, that if the rule by inadvertence or otherwise was broken, it was a matter of the trial judge to decide what was to be done. He had to consider whether to refuse to hear the action any further and direct it to be tried before another tribunal. On the other hand, if he was satisfied that no injustice would be done, he might allow the matter to proceed, and if he adopted the latter course, that in itself afforded no ground for an appeal from the order ultimately made. *Williams* v. *Boag* (85 SOL. J. 129) goes further and indicates a type of case where it will actually be desirable to inform the judge that payment into court has been made. The point is obviously controversial, and we can imagine cases in which parties might feel some grievance at the result of the working of the rule.

The War Damage Act.

ON the Report Stage of the War Damage Bill being reached on 18th March in the House of Lords, the Lord Chancellor moved the addition of an important new sub-clause to cl. 6, which deals with the determination of questions as to cost of works, value and temporary repairs by the War Damage Commission. Appeals on questions of value are dealt with in sub-cl. (2), which makes such appeals lie to one of the panel of referees under Pt. I of the Finance (1909–10) Act, 1910. The new sub-clause provides that appeals, other than those which are brought under sub-cl. (2), may be brought on any question of law to the High Court. It further provides that rules of court regulating such appeals may provide for the hearing and determination of any appeal by a single judge, and the Commission will be entitled to appear and be heard on any appeal to the High Court. The Lord Chancellor drew attention to the fact that it was an advantage to bring a particular class of rather technical subject-matter before a particular judge, who, by mere repetition, becomes familiar with what he is administering, and thereby reduces to a minimum the risk of conflicting and confusing views. The probability of conflicting and confusing views being expressed

on an unfamiliar subject-matter was illustrated shortly afterwards in the respective speeches of LORD MANCROFT and the Bishop of London. The former stated that the fact that the Bill had to be "tinkered up" with 150 Government amendments did not confer much praise for foresight on the part of those who drafted the Bill, while the latter praised it as a most remarkable Bill, drafted with amazing skill. The right note was struck by the Lord Chancellor, who said that it was not surprising that a great many amendments had to be made after the Bill was printed, but that it was better to get these things right, and if it was important to get the legislation carried through promptly they must submit to inconvenience, if inconvenience it was, to considerable amendment in the course of the passage of the Bill. To lawyers, who appreciate something of the difficulties and complications of amending the law of property, it is only surprising that there were not more amendments and lengthier debates. One highly controversial matter remains outstanding, relating to LORD BARNBY'S proposal to pass on the appropriate proportion of the contribution to all mortgagees and not merely to mortgagees in the case of mortgages created on the occasion of and in connection with the acquisition of the interest or the execution of works of construction or improvement of the mortgaged property (cl. 25 (5)). That there is still some dissatisfaction on this matter is clear from a letter in *The Times* of 19th March from the managing director of the London County Freehold and Leasehold Properties, Ltd. Perhaps, a little further discussion on this question would not be superfluous. As readers know, the Bill received the Royal Assent on 26th March.

Juvenile Crime.

PUBLIC attention has recently been drawn to the increase in juvenile crime that has taken place since the outbreak of the war. Mr. WATSON G. BOYCE, the probation officer at the Southwark Juvenile Court, told the Howard League for Penal Reform at a luncheon on 6th March that juvenile delinquency had been accentuated by the conditions arising out of the war. Among the group from eight to fourteen years of age, he said, the loss of the sense of security, with sudden death almost a commonplace, fathers and relatives being away, perhaps never to return, and mothers hard worked and depressed, had brought about the increase. He alleged immorality in shelters and said that the rise in the wages of adolescents from £3 to £6 a week gave them far too much money to spend and drunkenness was increasing. A short article appeared in *The Times* of 8th March, in which it was stated that inquiries among welfare workers had shown that though Mr. BOYCE'S picture was overdrawn, the situation was nevertheless serious. Various reasons, such as lack of discipline owing to absence of parents, the closing of schools for long periods, the closing of clubs and the use of playing fields for other purposes, evacuation, the time spent in shelters and the inability of juvenile courts to impose suitable deterrent punishment, were all mentioned as causes of the increase in juvenile crime. The Chairman of the East London Children's Court, Mr. B. HENRIQUES, said that clambering over air-raid ruins and taking useless articles led to irritating charges of looting, and certain serious offences, such as housebreaking, were planned in the shelters. Much of this was due to a spirit of adventure that needed guidance into right channels. The evil effect of sudden wealth on undeveloped minds is undeniable. At Lambeth Juvenile Court on 6th March a girl of fifteen earning 37s. a week and a boy of sixteen earning £3 a week were charged with larceny. On the same day, at West London, Sir GERVAIS RENTOUL had occasion to tell four boys, one of whom he sent to Borstal, and two to an industrial school, that the high wages paid them were having a bad effect. A recent investigation has shown that the proportion of young persons arrested singly is about 40 per cent., the remainder being arrested in gangs which number from two to eleven persons, the overwhelming majority of which are two, three or four in number. Obviously the cause of the increase, though apparently multiple, is in reality unitary, and can be traced to the unnatural and morally unhealthy conditions under which many children and young persons are now living in towns. The remedies must be not merely the negative one of evacuation, but the positive harnessing of the activity of young people to useful work where schooling is necessarily restricted, and, without attacking any decent standards of life, compulsory restriction of spending money.

Magistrates in Juvenile Courts.

IN a reply given by the Home Secretary to a question put by Sir R. GLYN in the House of Commons on 6th March, it was stated that in respect of 600 panels of justices of the 989 juvenile courts in England and Wales, roughly 76 per cent. were between the ages of fifty-five and ninety. In the course of another reply to a question put by Sir R. GLYN on 19th March, the Attorney-General made the interesting announcement that it was proposed to introduce legislation to facilitate the procedure by which magistrates who, for reasons of age or other infirmity, were no longer able to discharge their duties in court with full efficiency, can be placed on the supplemental list. Sir R. GLYN'S question was whether, in view of the number of justices over the age of seventy who are still appointed to adjudicate in juvenile courts in pursuance of the Juvenile Courts (Constitution) Rules, 1933, he would consider introducing legislation to assist the Lord Chancellor in reducing the average age of justices throughout the country. The question was obviously complementary to another question which Sir R. GLYN put on the 4th February, and to which reference was made in our issue of the 15th February (85 SOL. J. 74). The question on that occasion was whether any steps were in contemplation to induce persons who had reached the age of seventy-five years to offer their resignation as justices of the peace, and how many justices over the age of eighty continued to perform their duties on the bench. The reply of the Attorney-General on 19th March incorporated the answer given on 4th February, when reference was made to the system introduced by the Lord Chancellor under which magistrates who, for reasons of age or infirmity, were no longer able to discharge their judicial duties with full efficiency, could be placed upon a supplemental list of justices who could still perform administrative duties. Since November, 1940, it has been a condition of the appointment of justices that they should be placed upon the supplemental list on reaching the age of seventy-five. With regard to juvenile courts, it is quite true that under s. 45 of and the Second Schedule to the Children and Young Persons Act, 1933, only justices who are members of a panel of justices specially qualified to deal with juvenile cases may sit as members of a juvenile court. This, however, does not dispose of the matter of the age of magistrates, as the questions in Parliament emphasise that the age of the bench is one of the vitally important things which count in any attempt to secure understanding and tactful treatment of the young offender. It is difficult to understand why county court judges, who are compelled to retire at seventy-two, should be deemed a lesser breed than lay magistrates, who are merely asked to retire to a supplemental list at seventy-five, and required to do so only where they are appointed after November, 1940. While it is good to have the Attorney-General's assurance that something is to be done to remedy the matter, it is hoped that this will be more than the mere giving of statutory approval of the present unsatisfactory position.

Crowding of Remand Homes.

THE Home Office has recently issued a circular, over the name of Sir ALEXANDER MAXWELL, Permanent Under-Secretary of the Home Office, to local authorities inviting them to give their immediate attention to the increase of provision for remand homes in their areas. On a general review of the whole country, the circular states, it is estimated that each authority ought to increase its normal pre-war requirements by about 50 per cent., so as to allow adequately for present and future needs. Though statistics for 1940 as a whole are not yet available, provisional figures for the first four months of the year show an increase over the same period of 1939 of more than 50 per cent. in the number of young persons under seventeen found guilty of indictable offences by courts of summary jurisdiction. The result has been that remand homes are overcrowded and in many cases juvenile courts are not being provided with the facilities for remands in custody which they have a right to expect. Many courts have had to remand certain youthful defaulters to prison, a deplorable course unless the circumstances are wholly exceptional and the certificate required by s. 33 of the Children and Young Persons Act, 1933, can properly be given. The Home Office has itself endeavoured to make provision for the need by inviting voluntary bodies to undertake the establishment of new schools. By this means many new schools have been opened and others are in prospect. It is hoped that some of the pressure on remand homes will soon be relieved in this way. The circular urges the necessity of speedy action by local authorities, which should make separate provision for the time being, unless neighbouring authorities can agree between themselves on immediate joint action. The circular states that the position may get worse if the increase in the number of juvenile offenders continues at the present rate. The provision of remand homes is not least among the curative remedies for juvenile delinquency, and the urgency of the situation is by no means over-stated in the circular, the object of which should be speedily realised.

New Defence Regulation.

An important new Defence Regulation relating to coroners' inquiries as to deaths in consequence of war operations was made on 14th March (S.R. & O., 1941, No. 340). The Regulation (30A) empowers registrars of deaths and persons authorised by the Secretary of State to report to the coroner for the area in or near which a death by war operations has or may have occurred to report that the body of that person has been destroyed or cannot be found, or is in a place from which it cannot be recovered, or cannot be identified, or has been buried as that of a person unknown or as that of some other person. On receiving the report the coroner must, unless he thinks that no useful purpose would be served by so doing, cause to be exhibited at suitable places near where the death is believed to have occurred, a notice to the effect that he proposes to inquire into the matter, specifying the time and place, and requesting persons with information about the matter to send it to the coroner or attend at the time and place so specified. Unless on the application of the coroner the Secretary of State otherwise directs, the inquiry must be held without a jury, and in private, and the coroner must not require the exhumation of a body which has been buried. The coroner's certificate must state that the death occurred in consequence of war operations if that is the opinion of the coroner. The coroner must forthwith transmit the certificate to the registrar for the sub-district in which the death is certified to have occurred and must notify any other person who may have made the report. The registrar must then register the death in the manner required or death registration on a coroner's certificate, and the registration must also show that it was effected on a certificate issued in pursuance of Reg. 30A. Section 38 of the Births and Deaths Registration Act, 1874, which prescribes the cases in which the entry in the register shall and shall not be evidence, applies to a registration under the new Regulation. Thus the Regulation will, in the cases in which it is carried out, dispose of the difficulty which was made apparent in a case before the President in the Probate Court on 19th March (*The Times*, 20th March), when an application had to be made for leave to swear the death of a London diamond broker as having occurred in September, 1940, when the shelter where he was last seen was hit by a bomb. The shelter was in a basement adjoining his flat, and after the explosion of a bomb no trace of the deceased was found, but his wallet and parts of his mattress were discovered. Leave was given, as his lordship found that a case had been made out for presuming that the death had occurred at the time of the explosion. The responsibility in the first instance will fall on those reporting cases of persons missing after air raids, who should be advised in appropriate cases to ask the registrar to exercise his powers under the Regulation.

Recent Decisions.

In *R.* v. *National Arbitration Tribunal, ex parte Bolton Corporation*, on 18th March (*The Times*, 19th March), the Divisional Court (the Lord Chief Justice and Tucker, J., Atkinson, J., dissenting), held that officers of the Bolton Corporation were "workmen" and a claim by them that their service pay if they undertook war service should be made up to their civilian pay was a "trade dispute" within the Conditions of Employment and National Arbitration Order, 1940 (No. 1305), made under reg. 58AA of the Defence (General) Regulations, 1939, and therefore the National Arbitration Tribunal had jurisdiction to decide the matter. An application by the Bolton Corporation for an order of prohibition directed to the National Arbitration Tribunal was refused.

In *The Charles Livingstone* on 19th March (*The Times*, 20th March), Langton, J., held that the owners of the pilot boat "The Charles Livingstone" were entitled to a decree of limitation of liability in respect of the loss of twenty-three out of thirty-three persons lost when the boat stranded in Liverpool Bay on 26th November, 1939. His lordship held that there was no fault in the plaintiffs as the ship was not a passenger ship by reason of the number of pilots on board who were passengers, and the ship was therefore not required to have a certificated master by reason of the bye-laws for the Port of Liverpool sanctioned by the Board of Trade, nor was she a home trade passenger ship within the meaning of the Merchant Shipping Act.

In *Turner* v. *Stella Bond, Ltd., and Another* on 20th March (*The Times*, 21st March) the Court of Appeal (The Master of the Rolls, MacKinnon and Goddard, L.JJ.), held, reversing the judgment of the county court judge, that in s. 11 (1) of the Landlord and Tenant (War Damage) Act, 1939 (dealing with the effect of notice to avoid disclaimer of a lease), the provision as to the cessation of payment of rent as applied to a covenant to pay rent quarterly in advance meant that there should be cut out of the quarter that period for which the premises were unfit.

Criminal Law and Practice.

Railway Companies and the Black-out.

The legal position of railway companies with regard to the Lighting (Restrictions) Order, 1940, was recently discussed (27th February, 1941) at the Kingston Petty Sessions, when the Southern Railway Company was fined £5 for an offence against para. 1 (*a*).

This regulation provides, as is well known, that "during the hours of darkness, it shall not be lawful—(*a*) for any light to be displayed inside any roofed building, closed vehicle or other covered enclosure in such circumstances that any illumination therefrom is visible from outside the building, vehicle or enclosure . . ."

It had been alleged that a bright light had been displayed on stairs at a village station and was visible from a skylight. Under the roof of the stairs five lamps were visible, four of blue glass and one of clear glass.

On behalf of the defendants it was argued that para. 1 (*a*) did not apply to railway companies, as the Legislature had realised that such concerns would have to close down after dark if it did. It was pointed out that railway companies were dealt with by para. 45 of the Order, and that that was the paragraph under which the proceedings should have been taken.

Paragraph 1 (*a*) is framed quite generally and no exceptions are made in respect of railway companies' premises or any other kind of premises. Indeed, para. 1 (*b*) goes on to sweep all other cases, not covered by 1 (*a*), into its net, by making it unlawful for any light to be displayed otherwise than in a roofed building, closed vehicle or other covered enclosure.

Paragraph 2 prohibits the display of such things as illuminated sky-signs and advertisements during the hours of darkness, and para. 3 provides (*inter alia*) that nothing in paras. 1 and 2 shall render unlawful the display of any light which is required or authorised by or under the following provisions of the Order.

The Order then goes on to specify what lights may be displayed on public roads, private roads, police stations, fire stations, vehicles, trailers, shops, stalls, hotels, and, almost at the end, in para. 45, it permits certain lights to be displayed in connection with the operation of railways. These consist of a list of some twelve kinds of light for trains, station platforms, signal boxes, etc.

Finally, para. 52 (4) and (5) deal with infringements of the Order. The former provides that, without prejudice to the liability of the occupier, any provision in the Order rendering unlawful the display of any light or requiring any light to be displayed or any other thing to be done or not to be done, shall be construed as including a specific provision that no person shall cause or permit that light to be displayed or not to be displayed or, as the case may be, that thing not to be done or to be done. The latter clause provides that where the display of any light is, under the provisions of the Order, lawful only if any conditions specified in the Order are fulfilled, then, without prejudice to the generality of cl. (4), any person who does any act whereby those conditions ceased to be fulfilled shall be deemed for the purposes of the Order to cause or permit the light to be displayed.

These last two provisions seem to contemplate and intend the possibility of proceedings being brought under any of the paragraphs relating to roads, police stations, shops, railways, etc., as well as under para. 1. Obviously the large number of classes of vehicles and premises to which the generality of para. 1 is to apply in only a modified sense makes it of vital importance to be quite clear as to the correct paragraph under which to prosecute.

On the other hand it may be said that paras. 1, 2 and 3 provide in effect that any lights not required or authorised by the following provisions of the Order are unlawful, and therefore prosecutions may be brought either under the particular provisions of the Order or under the general provisions in para. 1. Indeed, it may be argued, if it were not so, para. 1 would have an exceedingly limited application to private residences and to little else. The question is interesting and important, and possibly there will be some authoritative pronouncement upon it in the future.

A Bread Offence.

A little known type of crime was revealed by the British Broadcasting Corporation on 16th March in a broadcast under the intriguing caption "Can you beat it?" The broadcast was in the form of a game in which the announcer put forward a statement, which had to be corrected by the participants.

The particular statement of interest to lawyers was: "Jack maintains that we are breaking the law by having tea, brown bread and butter, white bread and butter, cakes and pastry just before black-out time on Sunday."

A lady participant in the game said that "Jack" was right to a certain extent, as no one was allowed to eat too much bread and butter. This answer reveals the gulf existing between the lay and the legal mind, as even if there were such a crime as eating too much bread and butter and cakes, there was no evidence as to how much was being eaten. Besides, as the announcer replied, one cannot be guilty of murder "to a certain extent."

The "correct" answer given was that the Bread Act, 1836, s. 14, makes it an offence to sell or expose for sale any bread or cakes of any sort after half-past one on Sunday. Whether this answer is quite accurate can be seen from a perusal of this little-used section, which, if the answer is right, appears to be more honoured in the breach than in the observance.

The section provides, *inter alia:* "No master or mistress, journeyman, or other person exercising or employed in the trade or calling of a baker . . . shall, on the Lord's day, or on any part thereof, make or bake any bread, rolls, or cakes of any sort or kind, or shall, on any other part of the said day after the hour of half-past one of the clock in the afternoon, sell or expose for sale, or permit or suffer to be sold or exposed for sale, any bread, rolls, or cakes of any sort or kind, or bake or deliver, or permit or suffer to be baked or delivered, any meat, pudding, pie, tart or victuals or in any other manner exercise the trade or calling of a baker, or be engaged or employed in the business or occupation thereof, save and except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking . . ." Then follow the penalties.

Clearly the section is designed to limit the carrying on of the bakery trade on Sunday and does not prevent the sale of bread and cakes on Sunday by other persons than bakers. This will possibly take a load from the consciences of some readers, who, on hearing the B.B.C. effort at imparting legal instruction, immediately felt some uneasiness. The British Broadcasting Corporation owes it to its millions of law-abiding listeners to dispel the discomfort that they must have felt in realising that all of them, at one time or another, had aided and abetted this breach of the law.

Possession of Mortgaged Land.

THERE seem to be some grounds for doubting whether the effect of the Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, on the right of a mortgagee to take possession of mortgaged land is generally appreciated, and it may be worth while to consider the material sections of the Acts on this question.

Section 1 (2) (ii) of the C.E.P. Act provides that a person shall not be entitled, except with the leave of the appropriate court, to exercise any remedy which is available to him by way of taking possession of any property. Now in legal language a remedy usually means a right which accrues to one person by reason of some other person's wrongful act, or failure to perform some act which he is under a contractual obligation to perform, and that that is the sense in which the word "remedy" is used in s. 1 (2) (ii) of the C.E.P. Act seems to follow from subs. (4) of the same section; for in the latter subsection the court is given power to refuse leave to exercise the remedy when it is of opinion that the person liable (*inter alia*) "to perform the obligation in question" is unable immediately to do so by reason of the war.

Now in most cases, apart from the Mortgage Act, the right of a mortgagee to take possession of the mortgaged land is not in that sense a remedy at all; for, as pointed out in "Coote on Mortgages," 9th ed., p. 821, the mortgagee is, in the absence of a covenant for quiet enjoyment, entitled, at any time after the execution of the mortgage, to enter into possession of the land independently of any default on the part of the mortgagor.

It would appear therefore that the C.E.P. Act alone would not make it necessary for a mortgagee to obtain the leave of the court before entering into possession in pursuance of his legal right.

The right of the mortgagee to take possession of the land is, however, taken away by s. 1 (1) of the Mortgage Act unless default has been made in payment of the mortgage money or any part thereof, or there has been a breach on the part of the mortgagor of any obligation arising under the mortgage other than an obligation to pay the mortgage money or interest thereon; and by subs. (2) of the same section default shall not be deemed to have been made in payment of any mortgage money unless a written demand for payment has been served on the person liable, and a period of three months has elapsed since the service of the demand.

The consequence of that section would appear to be that the right to take possession does become a "remedy" which is available to the mortgagee if, after demand, the mortgagor makes default in payment of the mortgage money, or there has been a breach of some other obligation under the mortgage, so that leave under the C.E.P. Act is necessary before that remedy can be exercised, and the court has a discretionary power to refuse leave where the default is due to the war, but not, apparently, on any other grounds.

Where the alleged default is in payment of the mortgage money there cannot, as a rule, be much dispute as to whether there has in fact been default or not as defined in s. 1 (2) of the Mortgage Act, but where the ground on which the mortgagee claims possession is that there has been a breach of some obligation arising under the mortgage other than an obligation to pay the mortgage money, a position of some difficulty may arise.

For instance, the mortgage deed may contain a covenant to repair, and the mortgagee may claim to be entitled to possession, notwithstanding s. 1 of the Mortgage Act, because there has been a breach of the obligation to repair.

In such a case the mortgagor may not be in a position to swear that the default, if any, is due to circumstances connected with the war, but he may not admit that there has in fact been a breach of the covenant to repair, and the question is, what course he should adopt and what order should be made in such a case, if the mortgagee applies for leave to exercise the remedy of possession. Obviously the court cannot decide, on such an application, the factual question whether there has or has not been a breach of the repairing covenant, and it has no power to refuse the leave unless it is of opinion that the mortgagor is unable to perform the obligation in question (that is to say, the obligation to repair) by reason of circumstances attributable to the war.

One answer may be that leave given to the mortgagee to exercise a remedy which is available to him by way of taking possession of the property is not equivalent to an order for possession of the property, and does not make that remedy available to the mortgagee if it was not already available subject to the necessity for obtaining leave. But the mortgagor may well feel that to acquiesce in an unqualified grant of leave to the mortgagee to exercise the remedy available to him by way of possession may be construed as an admission that the remedy is in fact available. It may be that in such a case the order should be in the form that the mortgagee is to be at liberty to exercise the remedy (if any) which is available to him by way of taking possession of the property, but without prejudice to the contention of the mortgagor that the remedy is not available.

A further question then arises as to how the costs of the application ought to be borne. It would be most unfair if the mortgagor were saddled with the costs of an application by the mortgagee for leave to exercise a remedy which turned out never to have been available to him, so that the costs should, at least, not be awarded against the mortgagor until the question of the right of the mortgagee to possession had been determined. But that question can only be determined in an action for the recovery of possession of land, and for the commencement of such an action (unless it is combined with a claim for foreclosure) no leave is necessary by proviso (*d*) to s. 1 (2) of the C.E.P. Act. As, therefore, an action will clearly be necessary before the mortgagee can establish his right to possession, and no leave is necessary for such an action, the application for leave to exercise the remedy of taking peaceful possession would appear to have been wholly futile, and it may well be contended that it should, on that ground, be dismissed with costs.

We have, therefore, reached the following conclusions:—

(1) If a mortgagee claims that, notwithstanding s. 1 of the Mortgage Act, he is entitled to possession of the mortgaged land because there has been default in payment of the mortgage money or a breach of some other obligation under the mortgage, and the fact of the default or breach is disputed by the mortgagor, the proper course for the mortgagee to adopt is to start proceedings for possession (for which no leave is necessary), and not to apply, under the C.E.P. Act, for leave to exercise the remedy; but

(2) If, in such circumstances, the mortgagee does make an application for leave to exercise the remedy, the mortgagor should apply to have the application dismissed with costs on the ground that it is futile, since an action will in any case be necessary before the mortgagee can establish his right to possession, and no leave is necessary to the commencement of such an action. But, if he fails in this contention, the order should make it clear that the leave is only to exercise such remedy, if any, as may be available to the mortgagee, and is without prejudice to the mortgagor's claim that no such remedy is available; and the costs of the application should be reserved until the question of the right of the mortgagee to possession has been determined in properly constituted proceedings.

The first of these conclusions may seem rather obvious. But it is not always acted on in practice, and the result in some cases has been to place the mortgagor in a position of considerable difficulty.

I should add that there is nothing in the Courts (Emergency Powers) Amendment Act, 1940, to affect either of the above conclusions.

A Conveyancer's Diary.

Appropriation.

IN these days the personal representative of a deceased person will often find that investments forming part of the estate cannot advantageously be realised within a year from the death. He will therefore wish to know how far he can go in appropriating the estate in specie. His powers in that behalf must rest either on an express provision in the will or on s. 41 of the Ad. of E.A., 1925. There was no earlier statutory power, though, of course, personal representatives could always agree with a beneficiary of full age and absolutely entitled that there should be an appropriation to answer his interest. But most cases are not as simple as that, and s. 41 met an important need. By that section the personal representative has power to appropriate any part of the real or personal estate in or towards satisfaction of any legacy or any other interest, settled or not, in the estate, subject to certain qualifications. Thus, no appropriation may be made so as to prejudice any specific devise or bequest, and certain consents are required. If the interest in question is an absolute interest the beneficiary's consent is necessary. If he is not *sui juris*, his parent or parents, guardian, committee or receiver may give consent on his behalf. If the interest is settled, the consent is required of either the person entitled to the income-interest in possession or of the trustee of the settled fund. If there is no one presently entitled to income, and no trustee of the settled share beyond the personal representative himself, no consent is required provided the appropriated investment is a trust investment authorised by law or by the will. Similarly, if the consent primarily required is that of a lunatic or defective and there is no committee or receiver, no consent is required provided an authorised investment is appropriated. If the required consent is that of an infant and there is no parent or guardian, the court may consent. No consent is required on behalf of a person not *in esse* or one who cannot be found or ascertained at the time, other than the consent of the trustee of the fund if it is settled. Under s. 41 (4) an appropriation made under s. 41 binds all persons interested in the property whose consent is not expressly made requisite; and, in favour of a purchaser from the beneficiary in whose favour an appropriation of realty is made, the appropriation is to be deemed to have been properly made (subs. (7)). Finally, a fund can be appropriated to answer an annuity by its income or otherwise (subs. (9)).

It has become fairly common for draftsmen of wills to incorporate a provision that the statutory power of appropriation is to apply with the modification that no consents at all are to be required. Such a provision does not, however, appear to be the statutory power at all, but is an express power compendiously phrased by reference to s. 41: if so, it is not at all clear that it would have the binding effect of the statutory power. Moreover, in an ordinary case it gives the personal representative too much power and should not be inserted without careful consideration and preferably on express instructions from the testator. The consents for which the Act provides are carefully thought out and are scrupulously fair. They do not impose any check so severe as to cause real inconvenience, and it seems best to keep them. The learned editors of "Wolstenholme" (12th ed., p. 1483) suggest that by making consents unnecessary *ad valorem* stamp duties may be saved. It is, I think, worth while to examine this suggestion.

In the old days when there was no statutory power to appropriate, it was held that a beneficiary of full age and absolutely entitled might agree with the personal representative for an appropriation. *In re Beverley* [1901] 1 Ch. 681, the court explained the basis of this rule by saying that the executor held the estate on trust to sell (or, perhaps, with power to sell) and might sell the appropriated part to the beneficiary for an amount equal to the amount of his legacy or share or the relevant portion of his legacy or share. On this footing an appropriation was really a sale, and naturally attracted stamp duty as such. The argument appears to be that if instead of an appropriation by agreement the executor exercises a right to force property on a beneficiary (for that is what a right to appropriate without consent amounts to), the transaction is not a sale and does not attract *ad valorem* duty as such.

Now, it has recently been held in *Jopling* v. *C.I.R.* [1940] 2 K.B. 282, that for the purpose of stamp duty the statutory power is on the same more or less contractual footing as the former power, at least where the legatee is entitled absolutely. In that case stock transfers made to give effect to an appropriation to a legatee absolutely entitled were held to be subject to *ad valorem* stamp duty. But stamp duty is a duty on instruments and therefore the rule laid down in *Jopling* v. *C.I.R.* must be limited to cases where there is an instrument to stamp. Thus it is difficult to see how duty can be attracted if the appropriation and consent are made orally and no stampable instrument is used. Thus, if the subject-matter of the appropriation is a chattel which can be transferred by delivery, all that is necessary is delivery, and there is no instrument to attract duty. In *Jopling's Case* there was an oral appropriation and consent coupled with a stampable instrument, a stock transfer. But for realty and chattels real s. 36 of the Ad. of E.A. enacts that the personal representative may make an assent in writing in favour of "any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto," and it is expressly provided that an assent is to attract no stamp duty (subs. (11)). The learned editors of "Wolstenholme" comment on this subsection (see p. 1476) that an "assent must not be used in place of a conveyance on sale by the representatives or where *ad valorem* duty is payable." There appears to be no authority for this proposition, and I have never been able to understand how it can be correct even as regards a transaction by sale. Still less so, where the transaction is an appropriation, a case expressly included in s. 36 (1). It seems very difficult, therefore, to see how, under the modern law, any *ad valorem* stamp duty can be attracted by an oral appropriation of realty followed by an unstampable transfer, i.e., an assent. The power of giving these written assents applies to "real estate," an expression which includes chattels real (see s. 55 (1) (xix)).

If I am correct, there seems to be no saving in excluding the necessity for consents to appropriations of chattels personal or realty as so defined.

There is also a small point which I have seen cause trouble in practice and where I think certain implications of a statement in "Wolstenholme" are doubtful. It is this: Suppose there are two settled legacies each of £1,000 and there is a piece of realty worth £2,000 which the executor desires to appropriate, the life-tenants being prepared to consent. Is this appropriation feasible? "Wolstenholme" states that since the singular includes the plural, a single fund may be set aside to answer two annuities (see p. 1487). I take it that there is no difference for this purpose between an annuity and a settled legacy. But even so, I am not sure that this can be done. How is the appropriation to be made? The property cannot be conveyed to the legatees as tenants in common, since nowadays L.P.A., s. 1 (6), prevents a legal estate existing in an undivided share. So it must be done, if at all, by an assent to someone on trust for sale, and to hold the proceeds of sale in two settled moieties. But that transaction is not an appropriation to the settled legacies of any part of the testator's estate. It is the creation of a fresh entity, the proceeds of sale of a piece of realty, and the appropriation of that new entity to the legacies. Such an arrangement does not seem to be contemplated by s. 41, and it would be best to refrain from it.

Landlord and Tenant Notebook.

Business User as a Question of Degree.

WHEN referring last week to *Chapman* v. *Hughes* (1923), 129 L.T. 223, in which a landlord of controlled premises recovered possession on the ground of breach of covenant to use a private dwelling-house only, I mentioned that the defendant was indifferently described, in different parts of the report, as a "piano-tuner," "dealer in pianoforte instruments," and both; and I made a comment to the effect that if he had indeed been a piano-tuner, and nothing more, it would be difficult to see how the covenant could have been infringed. For, in the case of that particular profession, "all work done upon the premises" would decidedly not attract custom.

Curiously enough, authority on the question how much user for business purposes will constitute a breach of covenant of this kind is scanty. There are plenty of decisions on the nature of the activity which will be held to be an infringement, on the difference between trade and business ("Every trade is a business, but every business is not a trade": Denman, C.J., in *Doe d. Wetherell* v. *Bird* (1824), 2 A. & E. 161); and more than plenty on the connotation of terms describing particular businesses ("The business of a ladies' outfitter is one business—the business of a hosier is a distinct business":

Bowen, L.J., in *Stuart* v. *Diplock* (1889), 43 Ch. D. 343 (C.A.)). But if anyone were to ask: Suppose that the defendant in *Chapman* v. *Hughes* was in fact a tuner *simpliciter* would he, say, if he displayed a notice to that effect on the house and actually concluded contracts for the tuning of pianos with clients who attended or telephoned to him at the house, be held liable for a breach?

I do not think we can get anything nearer, at present, than *Wilkinson* v. *Rogers* (1864), 2 De G. J. & S. 62, in which an interlocutory injunction against a tenant was discharged on appeal. The second defendant was the tenant of an assignee of a lease of a house containing a covenant to keep and use it as and for a private dwelling-house only—but the covenant went on to authorise departure from its provisions in the event of any of three other houses, belonging to the same lessor, being "converted" into shops. It was this stipulation that prevented us from acquiring direct authority on the problem under discussion. What was alleged against him was that he had put a notice in a window reading "Alpheus Andrews, Coal Office, and at the Coal Exchange," and that he took orders for coal on the premises; and while he asserted that he kept no stock in the house and denied that his activities infringed the covenant, if binding, he had an alternative answer: the occupier of one of the other houses was a photographer who had built a studio at the rear and who displayed the usual show-case containing specimens of his work by the front door. Consequently, argument centred mainly round the proper construction of the condition resolutive attached to the covenant; and when discharging the injunction restraining the defendants from carrying on or allowing to be carried on the business of a coal merchant on the premises, Knight Bruce and Turner, L.JJ., made it clear that they did so because the question whether the covenant was broken was arguable and should be gone into at the trial of the action. The decision is some authority for the proposition that "conversion" can be effected without physical alteration, and that a photographer's studio is a "shop," but in the absence of any report of any subsequent proceedings, it does not definitely tell us whether a merchant who enters into agreements to sell his wares, but does not keep his wares, on premises, carries on business on those premises.

The presence in many covenants restricting user of an express prohibition of auction sales may be accounted for by *Reeves* v. *Cattell* (1876), 24 W.R. 485, when Jessel, M.R., refused an injunction, applied for on the strength of a general covenant against business, to restrain the covenantor tenant from holding an auction sale of his own furniture. But the learned Master of the Rolls made this observation: "It would be a different thing if furniture were brought to the house for the purpose of being sold there." This is, of course, an *obiter dictum*; and it is not easy to say whether such authority as it bears would support the proposition that a single auction sale would contravene the covenant.

The extent to which premises may be used for the purposes of business may be a matter of space as well as time, and in this connection mention may be made of the "bill-posting station" cases. In *Nussey* v. *Provincial Bill Posting Co. and Eddison* [1909] 1 Ch. 734 (C.A.), restrictive covenants forbade the erecting of any building "for the carrying on of any . . . offensive trade or calling." What matters for present purposes is that the Court of Appeal, while there was dissent on other points, practically assumed that bill-posting was a trade or a calling, and that the limited size of the area affected was not considered relevant in the circumstances of the case. But in *Tubbs* v. *Esser* (1909), 26 T.L.R. 145, in which a tenant, bound by a covenant not to use or permit the use of the premises for the purpose of any trade or business, or exercise or permit the exercise of any, etc., but to use them as a private dwelling-house only, had let the gable-ends of the house to a bill-posting concern, the above decision was applied: it was held that the "bill-posting station" was analogous to the large hoarding dealt with in the earlier case, that consequently a trade or business was being carried on upon the premises, and that the covenant to use them as a private dwelling-house only was broken as well as the covenant prohibiting business.

Lastly, the question may be one of volition as well as degree, as appears from a judgment of Jessel, M.R., in a case, *Portland* v. *Home Hospital Association*, decided in 1879 and not reported at the time, but summarised in a note to *Rolls* v. *Miller* (1884), 27 Ch. D. 71 (C.A.), at p. 81 *et seq.* The covenant was against using or permitting to be used for business, etc., purposes, and his lordship gave imaginary instances of what he would regard as user which was "a mere accident, not that to which the house was devoted." These included the exercise of his calling by a physician attending a patient at the house of the latter, the patient being bound by such a covenant; but also, a case in which a physician with consulting rooms away from his residence saw a patient at his, the physician's, residence, let to him with such a covenant, because the patient arrived too late at the consulting rooms; and even a case in which a patient was seen, by chance, at another patient's house. "The accident of something taking place in the house is not permitting the house to be used for that purpose."

Our County Court Letter.

Tithe Redemption Annuities.

In *Tithe Redemption Commission* v. *Northcote*, recently heard at Exeter County Court, the claim was for 7s., being three and a half years' arrears of tithe redemption annuities to the 1st April, 1940, at 1s. per half-year. The respondent was assessed at an annual sum of £40 13s. 6d., and his contention was that a half-yearly payment of £20 6s. 9d. was therefore correct, and this was the amount he had paid. The case for the applicants was that, on the statutory basis of calculation, the proper half-yearly payment was £20 7s. 9d. This difference of 1s., for three and a half years, constituted the amount of the claim. The applicants had made their calculation by charging a separate annuity on each tithe area, and charging a separate calculation on each. Under the Tithe Act, 1936, the tithe redemption annuity was fixed at £91 11s. 2d. for every £100 of tithe rent-charge on agricultural land. A calculation to three decimal points gave the amount of the annuity. There was no express provision in the Tithe Act, 1936, that the half-yearly instalments should be equal, but this was laid down in the Tithe Act, 1836, s. 67. It was provided, however, in the Tithe Act, 1936, s 47 (4), that in calculating any annuity, or an instalment thereof, fractions of a penny less than a halfpenny should be disregarded, and fractions of a penny amounting to a halfpenny or more should be treated as a whole penny. If the respondent's contention were to prevail, there would be financial chaos, and a loss on redemption of £2 10s. 5d. in his particular case. The loss on the whole scheme would amount to £196,658. The respondent's case was that he had paid all the amounts due. There should be an aggregation, viz., the annuity should be calculated on the total amount due from him as a landowner, and not by treating each tithe area as a separate unit. Moreover, the respondent's method of calculation of the half-yearly instalments had been accepted, in his particular case, for the first two years of the operation of the Tithe Act, 1936. Prior to that Act, Queen Anne's Bounty had published tables (for the calculation of tithe rent-charge) which supported the respondent's method. His Honour Judge Thesiger observed that there was no provision for aggregation in the Tithe Acts, which did require equal half-yearly payments. The provision in s. 47 (4), *supra*, of the Tithe Act, 1936 (relating to the calculation of halfpennies) could only be complied with by collecting the annuity and instalments on the method adopted by the Commission. The result might be, in some cases, to increase by a few pence the amount payable by the tithe-payer, but this may have been present to the minds of those who fixed the annuity at £91 11s. 2d. for every £100 of tithe rent-charge on agricultural land. Judgment was given for the applicants for 7s., with costs on Scale C, in view of the difficult question of law and the number of people involved. Leave to appeal was granted, with a stay of execution for twenty-one days and thereafter if notice of appeal was given within that time.

Repairs to House.

In *Nixon* v. *The Bold Building Co., Ltd.*, recently heard at Coventry County Court, the claim was for £50, as damages for breach of contract. The plaintiff's case was that on the 8th March, 1938, he purchased from the defendants a freehold house for £535. A condition of the sale was that if the premises (while still owned by the plaintiff) within two years developed any fault due to defective materials or workmanship, the defendants would replace or repair the same at their own cost. In November, 1939, the following defects appeared: fracture of the brickwork and plaster at the back porch and larder (caused by settlement due to lack of or bad foundations), absence of lead flashings and absence of cement filleting where the roof of the outbuildings abutted on the main wall, failure to bind the brickwork into the main wall, and absence of spouting causing dripping of water on to the foundations. An architect gave evidence that the wall complained of should be pulled down and rebuilt. This was denied by the defendants, whose case was that in January, 1940, they had offered to fill up the cracks, but their offer was refused. Their architect's evidence was that the wall did not require to be pulled down as the defects could be remedied by under-pinning. His Honour Judge Hurst gave judgment for the plaintiffs, with costs. Compare *Miller* v. *Cannon Hill Estates, Ltd.* (1931), 75 Sol. J. 155.

To-day and Yesterday.

Legal Calendar.

24 March.—Richard Hathaway was tried at the Surrey Assizes as a cheat and an impostor on the 24th March, 1702.

25 March.—John Williams, Archbishop of York, died at Glodded, in his native Carnarvonshire, on the 25th March, 1650, his sixty-eighth birthday. Since the King's cause was lost he had lived in retirement in Wales, mourning his royal master's death in solitude, and seldom speaking. When Francis Bacon had fallen into disgrace he had succeeded him as Lord Keeper, the first ecclesiastic to hold that office since the reign of Queen Mary. By extraordinary industry and also by invoking the aid of two judges he made a success of his work in Chancery. Once, thinking to puzzle him, a barrister brought on a motion "crammed like a grenade with obsolete words, coins of far-fetched antiquity which had long been disused." But, to the amusement of the Bar, Williams foiled him by answering "in a cluster of the most crabbed notions picked out of metaphysics and logic, as categoremattical and syncategorematical."

26 March.—When Parliament adjourned on the 26th March, 1621, Bacon, who only three months before had reached the pinnacle of his honours with the title Viscount St. Albans, remained in a state of unpleasant anticipation, for the House of Lords had appointed a committee to examine the charges against him that he had been guilty of corruption in the office of Lord Chancellor. A month later, after the renewal of the session, he admitted his guilt, confessing to the receipt of bribes from parties to suits before him, amounting to £11,000.

27 March.—Mr. Justice Reeve, who was appointed to the Common Pleas in 1639, was a Norfolk man who had read for the Bar at Gray's Inn. He was "a man of good reputation for learning, who in good times would have been a good judge." As it was he lived in the hard, bad times of the Civil War. In July, 1642, he gave good advice to King Charles when he arrived at Leicester during the Assizes. In the following year when the royal proclamation to adjourn to Oxford was delivered to him at Westminster he was the only judge still sitting in his court. He was subservient enough to the Parliament to have the messenger arrested, that he might be court-martialled and executed as a spy. He died on the 27th March, 1647.

28 March.—Till he was hanged before a crowd of 3,000 people at Aylesbury on the 28th March, 1845, John Tawell led a very successful double life, his chief stock-in-trade with the worthy being a respectable garb, sedate demeanour and outward benevolence. It was true that in early life a series of forgeries had brought about his transportation to Australia, but in exile he behaved admirably, prospered as a chemist in Sydney, and eventually returned home almost completely restored in status. Though the Quakers indeed would not re-admit him to their society, he wore their garb, used their phraseology, built schools, founded savings banks and promoted schemes of benevolence. But there was another side to him, and he was eventually hanged for poisoning Sarah Hart to conceal his liaison with her from his wife. He died with the air of a martyr in the dress of the Society of Friends.

29 March.—On the 29th March, 1834, Joseph and William Jones were tried at Norwich for a highway robbery in which they had taken a watch and some money from Mr. Molton, an artist. The prisoners, who were strangers in the town, were above the ordinary in appearance, and displayed a superior education. The prosecutor's story was that while out for a walk he had been stopped and robbed by two well-dressed young men, one of whom wore a mask. Ten days later he had recognised them in the market place, and they had fled on seeing that he knew them again. The prisoners defended themselves with ingenuity and talent, trying to establish a case of mistaken identity and to explain away a mask found in their possession, but they were sentenced to death.

30 March.—On the 30th March, 1807, George Allen was hanged at Upper Mayfield for the murder of three of his four children, of which he had been convicted at the Stafford Assizes. We are told that he appeared sensible of his dreadful situation and entreated the spectators to take warning by his fate. He was an honest, industrious man who had lived happily with his wife for seventeen years. Then suddenly one night he accused her without cause of having another man in the house and tried to cut her throat. Before help could be fetched he killed the three children, nearly severing their heads with a razor and disembowelling two of them. He made no attempt to escape.

THE WEEK'S PERSONALITY.

Richard Hathaway, a blacksmith's apprentice, makes a brief but interesting and also somewhat important incursion into English legal history, for his trial marks the turning of the tide in the matter of witchcraft trials. He made his first dramatic appearance one Sunday morning in 1701, when there was a disturbance during divine service, and a woman named Sarah Marduck was accused of bewitching him. He displayed the symptoms customary in such cases, vomiting pins and needles and seeming unable to eat, speak or open his eyes. The orthodox cure was for the sufferer to scratch the witch who was afflicting him and Hathaway said he thought it would do him good, but a sceptical doctor tricked him into scratching someone else, and when he professed himself better several people were satisfied that he was an impostor, and he was much cast down. The mob, of course, was on his side and so persecuted the woman that she had to leave her Southwark home and seek refuge in the City, but even there Hathaway and his mob pursued her. Eventually she was tried for witchcraft, but on her acquittal he was arrested as a cheat. Fortunately his trial came on before a great and sensible judge, Chief Justice Holt, and he was duly found guilty of imposture, riot and assault, the most notable instance till then of the turning of the tables on a witch finder. He was fined 200 marks, sentenced to be flogged, imprisoned for six months and to stand in the pillory at Southwark, Cornhill and Temple Bar.

DISENCHANTMENT.

AT Birmingham Assizes recently Mr. Justice Cassels remarked that the fact that married people do not get on well together is not quite a ground for divorce at the moment. He added: "There have to be grounds, otherwise we shall have people coming here and saying, 'She is not so good-looking as I thought.'" It might very well have been otherwise if certain eighteenth century legislators had had their way and succeeded in getting through Parliament a Bill in the following terms: "That all women of whatever age, rank or profession, whether maid or widow, who shall after this Act impose upon and seduce into matrimony any of His Majesty's subjects by means of scents, paints, cosmetics, artificial teeth, false hair, bolstered hips, high-heeled shoes, or iron stays, shall incur the penalties against witchcraft and the marriage be declared null and void." Few marriages could stand a test like that. On the whole, judges seem to take a view of matrimony so sober as to be definitely discouraging. Only last year in the Divorce Court, when a counsel asked his client the routine question, "Was your marriage happy at the start?" Mr. Justice Bucknill intervened to say, "We cannot assume that marriage is a state to which the word 'happy' can properly be applied. It is enough if a spouse can say that it was even normal."

IN THE DARK.

Just after the jury had brought in a verdict of "Guilty" in a sensational case at the Old Bailey recently, the lights mysteriously went out, and in the darkness there were shouts of "Black justice!" from the dock. (It turned out later that the incident arose merely from the conscientiousness of an electrician following a black-out routine.) The thing reminds one of the verses addressed to Mr. Justice Day on an occasion when he proposed to sit long into the night to try some prisoners:

> "Try men by night? My lord, forbear!
> Think what the wicked world will say.
> Methinks I hear the wretches swear
> That Justice is not done by Day."

Once at Stafford the court lights failed just as the jury had returned to deliver their verdict in a murder trial. For several minutes the room was in complete darkness, till a few lighted candles were brought. By their flicker you could see the outline of the face of Mr. Justice Pickford and of the prisoner in the dock. Gravely the foreman of the jury announced the verdict of "Guilty," and the judge assuming the black cap, pronounced sentence of death, which the prisoner received without visible emotion. Some time ago while the late Mr. Martin O'Connor was arguing a case in the Court of Mr. Justice Acton, he said: "Every electrical device in the world is likely to go wrong." At that very moment the lights in the court fused and went out, leaving the place in darkness. "Well," said the judge's voice, "that certainly supports your argument. I am sure no one can say you have done it on purpose."

Practice Notes.

Serving Soldier: Stay of Action.

WHERE an action is brought in the King's Bench Division against a serving soldier, the practice, as settled by the Masters in King's Bench Chambers, until *Bell* v. *Walker* (1941), 1 All E.R. 307 (decided on 19th December, 1940), has been to stay the action "on usual terms as to serving soldiers." Those "usual terms" were: "Action to be marked stayed. The Treasury Solicitor to inform the plaintiff's solicitor when he is ready to proceed to trial. Liberty to the plaintiff thereafter to restore the case to the active list." The action of a serving soldier is normally conducted by the Treasury Solicitor.

In *Bell* v. *Walker* the Court of Appeal condemned this practice.

"It is the duty of the master," said Sir Wilfrid Greene, M.R., "to examine the facts of each individual case, and though I do think that in some cases a stay of this kind may be proper, whether or not it is so depends entirely on the facts of the particular case. Therefore I shall be glad to see this 'usual order' as such disappear and an order for a stay made only after a proper and full consideration of the facts and only when the facts warrant it" (at p. 309).

Bell sued Walker, a serving soldier, for damages for personal injuries sustained in an accident near Worcester, where the plaintiff's witnesses lived. The defendant wished to call a soldier, two members of the R.A.S.C. and a London consultant. The plaintiff asked for the trial to be at Birmingham. The master ordered the venue to be at Middlesex and stayed the action "on usual terms as to serving soldiers."

On appeal, Wrottesley, J., cancelled the stay and directed the action to be placed in the list at the next Worcester Assizes. The Court of Appeal held that the learned judge took the right view as to the stay and as to venue. The defendant might still apply, nevertheless, for a reasonable adjournment.

The reason for a stay, the Master of the Rolls pointed out, is to enable the serving soldier to trace any other soldier who may be required as a witness—sometimes a long and difficult task. But undue delay may seriously prejudice the plaintiff; his witnesses, also, may move from one part of the country to another, or may even be killed by enemy action.

"The function of the court in such cases is to weigh carefully all the facts of each individual case and to endeavour to do justice between the parties, not favouring the plaintiff or the defendant, but, at the same time, the plaintiff must have his case heard on such materials as are available at a reasonably early date" (at p. 308).

Evidence Act, 1938: Statement by Plaintiffs' Employee.

IN an action for breach of contract and for passing off the plaintiffs tendered in evidence a proof taken from, and signed by, one Petrie, an employee who had been a tester. The proof was taken when the action was pending and P died before the action came to trial.

Their business was to supply a Plomien fuel economiser which reduces the amount of fuel used in a boiler. P's work was to test the boilers to which the device was fixed. The plaintiffs were alleging breaches of contract and were saying that the defendants had passed off their Fedino fuel economiser as if it were the plaintiffs' device. They said that the defendants had issued a list of users. P stated in his proof that the device supplied to some of those users was not the defendants', but the plaintiffs' article. Now it would clearly have been to P's interest that his employers should win their case; his importance would have been increased, and possibly his remuneration, with the increase of sales.

By the Evidence Act, 1938, s. 1 (1), in civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document, tending to establish the fact, shall, on production of the original, be admissible in evidence of the fact, if certain specified conditions are satisfied. By subs. (3) nothing in the section will render admissible any statement made by a "person interested" when proceedings were pending or anticipated involving a dispute as to a fact which the statement might tend to establish. By subs. (5) to decide whether a statement is admissible, the court may draw any reasonable inference from the document or other circumstances.

In *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* (1941), 1 All E.R. 311, Morton, J., held that the proof of evidence of P was inadmissible under the Act as being the evidence of a "person interested."

Every shareholder and every director of a limited company is a "person interested" in the success of proceedings; whether a servant is or is not such a person is a question of fact in the circumstances of the case (at p. 314).

"I think that the general intention of the section," said Morton, J., "is that, if a statement is put in evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish, or a statement made by what I may perhaps conveniently describe as an independent person" (*ibid.*).

Correspondence.

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL.]

Payment into Court.

Sir,—With reference to your report of the case of *Williams* v. *Boag* (85 SOL. J. 129), has not the time arrived when the judge should at any stage in an action be informed of a payment into court? The judge can be trusted to draw his own conclusions.

The practice of blindfolding a judge does not assist the administration of justice.

17th March. BETA.

Obituary.

MR. A. N. BREVITT.

Mr. Arthur Nelson Brevitt, solicitor, of Wolverhampton, died on Sunday, 16th March, at the age of sixty-seven. Mr. Brevitt was admitted a solicitor in 1896.

MR. ALEXANDER GRANT, K.C.

Mr. Alexander Grant, K.C., died on Friday, 21st March, at the age of seventy-four. He was called to the Bar by the Inner Temple in 1891, and took silk in 1908. He was made a bencher of his Inn in 1918, and became Treasurer last year.

SIR MALCOLM McILWRAITH, K.C.

Sir Malcolm McIlwraith, K.C.M.G., K.C., died on Tuesday, 18th March, at the age of seventy-five. He was educated at Marlborough and at Berlin and Paris, and in 1890 was called to the Bar by Lincoln's Inn. In 1914 he took silk, and in 1922 became a bencher of his Inn. From 1898 to 1916 he was Judicial Adviser to the Egyptian Government.

MR. P. E. MORRANT.

Mr. Percy Edwin Morrant, solicitor, of Messrs. Batchelor and Co., solicitors, of Greenwich, S.E.10, died on Thursday, 6th March, in a fire which occurred at an hotel where he was staying. He was sixty-nine years of age, and was admitted a solicitor in 1922. He was also Deputy Clerk to the Blackheath Justices.

HIS HON. JUDGE LONGSON.

His Honour Judge Edward Harold Longson, Judge of County Courts Circuit No. 19 (Derbyshire), died on Friday, 21st March, at the age of sixty-eight. He was educated privately and at New College, Oxford. In 1895 he was called to the Bar by the Inner Temple and practised in the Chancery Palatine Court at Manchester until his elevation to the bench in 1931.

SIR SHAH MUHAMMAD SULAIMAN.

Sir Shah Muhammad Sulaiman, one of the three original members of the Federal Court of India, has died at Delhi, at the age of fifty-five. He was educated at Allahabad University and Christ's College, Cambridge, and was called to the Bar by the Middle Temple in 1910. In 1923 he was made permanently Puisne Judge of the Allahabad High Court, and in 1932 was appointed to the Chief Justiceship. He received the honour of knighthood in 1929.

MR. ALBERT LEICK.

Mr. Albert Leick, who had served as a clerk in the Metropolitan Police Courts for thirty-five years, died on Saturday, 8th March, at the age of sixty-five. From 1929 to 1937 he was Chief Clerk at Bow Street Police Court. Mr. Leick was a member of the Criminal Procedure Committee, whose labours resulted in the passing of the Criminal Justice Act, 1925, and he was also a member of the Home Office Committee on the work of Courts of Summary Jurisdiction in the Metropolitan Police Court area. After his retirement he was appointed a Justice of the Peace for the County of London and a Chairman of juvenile courts. He contributed articles to several legal journals, among them THE SOLICITORS' JOURNAL, and was the author or editor of a number of legal text-books.

Notes of Cases.

APPEALS FROM COUNTY COURT.

Pease and Partners, Ltd. *v.* Birch.

Scott, Clauson and Goddard, L.JJ.
3rd, 4th, 5th and 24th February, 1941.

Workmen's compensation—False representation in writing that workman had not previously suffered from nystagmus—Statutory agreement—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 21 (1), *s.* 23 (1), *and s.* 43 (1) (*b*).

Appeal by employers from an award of His Honour Judge Kingsley Griffiths, made at Thorne County Court, on 21st November, 1940, under which they were ordered to pay the workman £1 10s. per week, plus supplementary allowances as compensation for the industrial disease of miner's nystagmus.

The workman entered the service of the employers on 26th September, 1938, and at that time he represented in writing that he had not previously suffered from nystagmus. The arbitrator found that that statement was false, and wilfully made. Having again contracted nystagmus during his service with the employers the workman obtained the certifying surgeon's certificate on 19th November, 1938, certifying that the disablement had commenced on 19th November, 1938. The employers paid from then until 8th June, 1940, when they stopped payment, having meanwhile learned, as a result of an admission by the workman to their own surgeon, that he had previously suffered from nystagmus. The workman thereupon took the present proceedings, claiming compensation. The Workmen's Compensation Act, 1925, s. 43 (1) (*b*), provides: "If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable." Actually the workman had been medically certified as suffering from the disease on five previous occasions.

SCOTT, L.J., said that on the issue of estoppel there was no evidence before the court of any representation of fact made to the workman by his employers, nor of any action thereon taken by the workman to his prejudice and he agreed with the county court judge's view that there was no estoppel and with his criticism of the passage in "Willis's Workmen's Compensation," 33rd ed., p. 657: "An unequivocal admission of liability binds the party making it although it is not acted upon by the other side . . ." That purported to state the effect of *Fraser* v. *Driscoll* (1916), 9 B.W.C.C. 264, an inadequately reported decision, which was criticised by Warrington, L.J., in *Dutton* v. *Sneyd Bycass Co., Ltd.* [1920] 1 K.B. 414. On the facts, as appeared in the present case, the use of the term "estoppel" was wholly misconceived. In the present case there was a statutory agreement which justified the decision of the county court judge. The feature of the Acts which, above all others, showed how Parliament hoped to save industry from the technicalities of legal procedure with its inevitable expense was the very method of agreement upon which this appeal turned. Section 21 (1) (of the 1925 Act) provided: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . the question, if not settled by agreement shall . . . be settled by the arbitration of a representative committee or of an arbitrator or of a judge of county courts . . ." Section 23 (1) provided for a memorandum of an agreement to be sent to the registrar of the county court and recorded as well as the award of a committee or of a lay arbitrator. This completed the full recognition of equivalence between agreement and award. The doubt whether an unrecorded agreement was within s. 21 or could have the same effect as a recorded agreement was removed by the decision of the Court of Appeal in *Williams* v. *Guest, Keen and Nettlefolds, Ltd.* (1925), 133 L.T.R. 111 (*per* Sargant, L.J., at p. 116. If, then an unrecorded agreement was just as effective as an unrecorded award of a lay arbitrator it must have the same consequences as the latter. It must thereafter preclude each party from raising anew any question which would have been relevant at the time when the agreement was negotiated, although it was not then raised. In that respect, its effect was analogous to that of the estoppel by record which was brought about by a judgment. Counsel for the appellants had relied on s. 43 (1) (*b*) and *Dutton* v. *Sneyd Bycass Co., Ltd.* [1920] 1 K.B. 414, but the only point decided there was that there was no estoppel by conduct to prevent the employers from disputing liability under the Act. Atkin, L.J., said (at p. 421) that an agreement could not give rights under the Act which were not given by the Act or give the county court judge jurisdiction to determine under the Act disputes which were not under the Act, but it was entirely different where the parties determined by agreement questions that arose within the Act. There was nothing in the decision in *Dutton's Case* which interfered with the court's judicial freedom in the present case. That view was also expressed in the Court of Appeal in *Williams* v. *Guest, Keen and Nettlefolds, Ltd.*, *supra*. *Scott* v. *Summerlee Iron Co.* [1931] A.C. 37, which was cited on behalf of the employers, was irrelevant to the present appeal. The statements by Viscount Hailsham and Lord Thankerton, at pp. 44 and 51 respectively, that the misstatement was a disqualification of the right to receive compensation were made with their lordships' minds on a question other than that before the court now. There was a subsequent Scottish authority which was directly in point, and that was *Jamieson* v. *St. Flanan Coal Co., Ltd.* [1935] S.C. 138. That decision was not binding on the court, but he concurred with the whole of Lord President Clyde's judgment, subject to one small modification. The question of the scope within which an agreement under the Act bound the parties in a case where s. 43 (1) (*b*) could, before agreement, have enabled the employer to disclaim responsibility did not necessarily depend on whether the provision was, on the one hand, a condition of the workman's right of compensation, or, on the other, a mere defence which the employer might raise if he chose. It depended primarily on whether the Act gave an arbitrator jurisdiction to decide the issue of fact. In his lordship's opinion it did. The appeal must be dismissed with costs.

GODDARD, L.J., said that Clauson, L.J., had read his judgment and authorised him to say that he agreed with it and adopted it. He could not agree that the mere fact of payment was no evidence of agreement. The employers could not now say that the agreement was vitiated by reason of the workman's misstatement on entering their service. The agreement to pay compensation was not induced by fraudulent misrepresentation. An agreement had the same effect as an award, and if the workman had taken proceedings to obtain an award and the employers had not set up the misrepresentations as a defence, they could not afterwards have relied upon it. If then they could not upset an award on this ground, neither could they upset an agreement.

COUNSEL: *G. R. Blanco White*, K.C.; *W. H. Duckworth*; *Gilbert Paull*, K.C.; *R. M. H. Everett*.

SOLICITORS: *Johnson, Weatherall, Sturt & Hardy*, for *Parker Rhodes, Cockburn & Co.*, Rotherham; *Corbin, Greener & Cook*, for *Raley & Sons*, Barnsley.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law]

Adams *v.* Adams.

Scott, Clauson and Goddard, L.JJ.
27th, 28th and 29th January, 24th February, 1941.

Husband and wife—Separation agreement—Subsequent decree absolute of nullity—Separation agreement not thereby discharged, frustrated or void—No mutual mistake—No necessary implication in agreement of continuance of marriage status.

Defendant's appeal from a judgment of His Honour Judge Englebach given on 19th December, 1940, at Shoreditch County Court, by which His Honour gave judgment for the plaintiff for £7 arrears of weekly payments at the rate of £1 per week due under a separation agreement made between the plaintiff and the defendant, who was then her husband, on 11th October, 1937. The marriage was on 11th April, 1936, and the husband obtained a decree absolute of nullity on 23rd September, 1940. In the county court it was contended by the defendant that the decree discharged the separation agreement, but the learned county court judge rejected that contention, and also held that he ought not to imply into the agreement a term limiting the defendant's obligation to pay the £1 a week to the duration of the marriage.

SCOTT, L.J., said that no hardship need result from a decision that the decree of nullity left the appellant bound by the separation agreement. On the decree absolute either party could have applied to the court to vary its terms, treating it as a post-nuptial settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and the appellant could even now apply by leave of the judge under r. 41 (1). No impossibility supervened to prevent the performance by the appellant of his promise to pay the respondent £1 per week. Secondly, the marriage remained effective until the appellant got his decree. Primarily the use of the words "void" and "voidable" was a metaphor from the law of contract and not truly appropriate to the law of status, but the use of the words in connection with the status of marriage had received judicial sanction. A bigamous marriage, or a marriage of parties so related in blood as to fall within the prohibited degrees, might be void, but not a marriage where one spouse was entitled to a decree of nullity on the ground that the marriage was incapable of consummation. Such a marriage was not void, but voidable. The separation agreement was therefore, when made a valid act *inter partes* and continued to be so until the decree, and was not discharged by act of law. There could not be found in the contract any provision, express or implied, that the continuance of the marriage status was to be a condition precedent to the recurrent obligation of payment. A condition could very easily have been inserted in it if the parties had intended it. Nor was it a necessary implication (*The Moorcock* [1899] 14 P.D. 64, and *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488). The question of the implication of the condition in the separation agreement was the very same as arose in *Charlesworth* v. *Holt* (1873), L.R. 9 Ex. 38, and in all the cases in which the view expressed in that case had been affirmed (*May* v. *May* [1929] 2 K.B. 386 and *Hyman* v. *Hyman* [1929] A.C. 601). Another decision directly in point was that of Farwell, J., in *Fowke* v. *Fowke* [1938] Ch. 774. With the judgment in that case his lordship agreed. With regard to the Irish case of *P.* v. *P.* [1916] 2 Ir.R. 400, which had been cited, that was a case of an ante-nuptial settlement and was no authority on a post-nuptial settlement, as the separation agreement in the present case should be regarded. Nor was it an authority for the proposition that where the ground of nullity was a party's incapacity to consummate, acts done during a so-called void marriage can be undone by a decree of nullity. The appeal would be dismissed, with costs.

CLAUSON, L.J., agreed, and said that it was new to him that a defendant could rely on frustration by reason of an event brought about purely by his own volition. In his opinion, *Charlesworth* v. *Holt*, *supra*, was decided on a correct principle and its principle was binding on the court.

GODDARD, L.J., agreed, and added that if a husband entered into a separation agreement in ignorance of the fact that his marriage was void—because, for instance, the marriage was bigamous, or the parties were within the prohibited degrees of affinity, and he did not know of the impediment—the deed was void (*Law* v. *Harrigan* (1917), 33 T.L.R. 381, following *Galloway* v. *Galloway* (1914), 30 T.L.R. 531). These cases proceeded on the ground of mistake, but there could be no mistake where a decree of nullity was obtained on the ground of incapacity after a separation, as the petitioning spouse *ex hypothesi* could have no greater knowledge of the facts when he or she petitioned than when they separated. The appeal was dismissed, with costs.

COUNSEL: *Valentine Holmes*; *S. Seuffert*.

SOLICITORS: *Wontner & Sons*; *Ludlow & Co.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

Inland Revenue Commissioners v. Becher.

Lawrence, J. 25th October, 1940.

Revenue—Sur-tax—Settlement—Power in settlor to revoke—Sums payable under settlement deemed settlor's income—Revocation of settlement—Finance Act, 1938 (1 & 2 *Geo. VI*, *c.* 46), *s.* 38; *Sched. III*, *Pt. II*.

Appeal by case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

By a deed dated the 3rd August, 1937, the respondent taxpayer covenanted with trustees that she would, during the time when she and her daughter (who was *sui juris*) should be living, or such shorter period as she should thereafter fix by deed executed by her with the consent of at least one of the trustees, pay the trustees on trust for the daughter such a monthly sum as would yield £65 after deduction of income tax at the standard rate. That net sum was paid monthly throughout 1937–38, the gross payment for the year accordingly amounting to £1,040, which the respondent taxpayer claimed as a deduction from her assessment to sur-tax for the year ending the 5th April, 1938. On the 19th April, 1938, the respondent by deed exercised her power under the deed of 1937 of revoking the trusts which it declared, so that the monthly sums ceased to be payable. In appealing against the assessment the respondent argued that the monthly payments were not within s. 38 of the Finance Act, 1938, so as to make them income of the respondent for the year in question, and that she was therefore entitled to deduct the £1,040 from the assessment. Reliance was placed on *Reid* v. *Reid*, 31 Ch. D. 402, and *Ex parte Todd*, 19 Q.B.D. 186. It was contended for the Crown that s. 38 of the Act of 1938 operated to make the monthly sums the income of the respondent and not that of any other person, and that the assessment was therefore correct. Reliance was placed on *Clarke* v. *Gant*, 22 L.J. Ex. 67. The Commissioners held on the construction of s. 38 and Pt. II of the 3rd Sched. to the Act of 1938 that the payments should not be treated as the respondent's income. The Crown appealed. By s. 38 of the Act of 1938, "(1) If . . . the terms of any settlement are such that—(*a*) any person has . . . power . . . to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor . . . will or may cease to be liable to make any annual payments" under "the settlement . . . any sums payable by the settlor" under "the settlement . . . shall be treated as the income of the settlor . . . and not as the income of any other person . . . (7) . . . this section shall apply for the purposes of assessment to income tax for the year 1937–38 and subsequent years and shall apply . . . to any settlement . . . whether made before or after the passing of this Act: Provided that . . . (*c*) . . . this subsection shal lhave effect, in relation to a settlement made before the 27th April, 1938, subject to . . . Part II of the Third Schedule to this Act . . ."

LAWRENCE, J., said that it was contended for the respondent that, although by s. 38 (7) the section was to apply, for the purposes of assessment to income tax, for the year 1937–38, and to any settlement whenever made, it could not be read as applicable to settlements which had been revoked before the Act had been passed, since by s. 38 (7) (*c*), s. 38 (7) was to have effect, in relation to settlements made before the 27th April, 1938, subject to Pt. II of the 3rd Sched., which gave an option to the settlor either to release or to disclaim the power of revocation or to revoke the settlement and make a new one in pursuance of the Act. Counsel for the respondent contended that if the settlor revoked before the passing of the Act of 1938, as had been done here, she could not have known of the terms of the option, and that therefore, on the principles stated in *Reid* v. *Reid*, *supra*, at p. 408, and *Ex parte Todd*, *supra*, at p. 198, the retrospective effect of the Act ought to be confined to settlements which were in existence unrevoked when the Act was passed. In his (his lordship's) opinion, however, the words in s. 38 (1), "if and so long as the terms of any settlement are such," must be read retrospectively, that was, as looking back to any part of the year 1937–38 in respect of which an assessment was to be made under s. 38 (7). Moreover, there was nothing in Sched. III to the Act to prevent a settlor from taking advantage of the option, even if he had revoked the settlement before the passing of the Act. The appeal must be allowed.

COUNSEL: *The Attorney-General* (Sir Donald Somervell, K.C.), *J. H. Stamp* and *R. P. Hills*, for the Crown; *N. C. Armitage*, for the respondent.

SOLICITORS: *The Solicitor of Inland Revenue*; *Walters & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Brueton v. Woodward.

Singleton, J. 24th February, 1941.

Limitation—Gaming—Cheques in payment of betting losses—Statute providing for recovery by action of sums so paid—Action brought eighteen years later—Whether statute-barred—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42)—*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 2—*Gaming Act*, 1922 (12 & 13 *Geo.* 5, *c.* 19), *s.* 1—*Limitation Act*, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2 (1), (3).

Action under s. 2 of the Gaming Act, 1835.

On the 19th and 24th June, 1922, the plaintiff, Brueton, gave to the defendant, Woodward, two cheques for £45 and £194 10s., drawn by him in the defendant's favour in respect of bets on horse races which the plaintiff had lost to the defendant. On the 10th August, 1940, he issued the writ in this action for the recovery of the sums so paid, relying on s. 2 of the Gaming Act, 1835. The defendant pleaded that the action was, by virtue of s. 1 of the Gaming Act, 1922, not maintainable; alternatively, that it was barred by the Limitation Act, 1939.

By s. 2 of the Act of 1835 ". . . in case any person shall, after the passing of this Act, make, draw . . . any note, bill . . . for any consideration on account of which the same is by any . . . Acts . . . declared to be void, and such person shall actually pay to the . . . holder . . . of such note, bill . . . the amount of the money thereby secured. . . . such money so paid shall be deemed . . . to have been paid for and on account of the person to whom such note, bill . . . was originally given upon such illegal consideration . . . and shall be deemed . . . to be a debt due and owing . . . to the person who shall so have paid such money, and shall accordingly be recoverable by action . . ." By s. 1 of the Gaming Act, 1922, "section 2 of the Gaming Act, 1835 . . . is hereby repealed. No . . . person acting in a representative or fiduciary capacity shall be under any obligation to make or enforce any claim under the said section in respect of any transaction completed before the passing of this Act . . . No action for the recovery of money under the said section shall be entertained in any court." By s. 2 (1) of the Limitation Act, 1939, "the following actions shall not be brought after . . . six years from the date on which the cause of action accrued . . . (*a*) actions founded on simple contract or tort . . . (*d*) actions to recover any sum recoverable by virtue of an enactment, other than a . . . sum by way of penalty or forfeiture." By s. 2 (3), "an action upon a specialty shall not be brought after . . . 12 years from the date on which the cause of action accrued." Counsel for the defendant, the plaintiff being unintentionally absent from the trial and therefore unable to give the necessary evidence, kept open the question whether the action was defeated by the Act of 1922, and relied on the Act of 1939. He contended that s. 2 (1) (*d*) was applicable, alternatively, that the action was barred by s. 2 (3). It was argued for the plaintiff, reliance being placed on *Shepherd* v. *Hills* (1855), 25 L.J. Ex. 6, that the Act of 1939 did not apply, but that the action was one brought on a statute and that therefore the Civil Procedure Act, 1833, applied to impose a period of limitation of twenty years. It was contended for the defendant that the action was, although for a sum recoverable by virtue of an enactment, not an action upon a statute.

SINGLETON, J., said that the last sentence in s. 1 of the Act of 1922 was obscure. The question whether an action was maintainable if the right of action under the Act of 1835 had accrued before the Act of 1922 was passed at once arose when the latter Act had come into force. His lordship referred to *Brookes* v. *Brown* (1922), 39 T.L.R. 3; *Beadling* v. *Goll*, 39 T.L.R. 128; *Bowling* v. *Camp*, 39 T.L.R. 31; and *Henshall* v. *Porter*, 39 T.L.R. 409. Only in the last-named case had the position been considered which arose in the present case, namely, that the right of action had accrued before the passing of the Act of 1922, but the action was not brought until afterwards. McCardie, J., there decided that the right of action given by the Act of 1835 was not destroyed. Scrutton, L.J., had deliberately left that point open in *Beadling* v. *Goll*, *supra*. McCardie, J.'s, decision was binding on him (Singleton, J.); he would otherwise have felt great doubt on the matter. Counsel for the defendant, however, while reserving the right to take that point in the event of an appeal, relied on the Limitation Act, 1939, reference being made to *Gutsell* v. *Reeve* [1936] 1 K.B. 272; 79 SOL. J. 796; where Romer, L.J. ([1936] 1 K.B., at p. 288), drew the distinction between an action brought on a statute and one based on a cause of action given by a statute. In his (Singleton, J.'s) opinion that case was not of much assistance here. Each case must depend on its facts and on the particular statute concerned. The right to sue here was created by the Act of 1835. In his opinion the plaintiff was suing on the statute. The debt was therefore a statutory debt for which twenty years would be

the limitation period, but for the Act of 1939. The present was an action on a specialty, and the period applicable was accordingly the twelve years prescribed by s. 2 (3). Whether the action came under s. 2 (1) (*d*) or s. 2 (3), it would be barred. The Act received the Royal Assent on the 25th May, 1939, and s. 34 (2) provided that it should come into operation on the 1st July, 1940. It was argued for the plaintiff that the Act did not apply to a case like the present, because that would involve taking away their rights from individuals, which the Act did not show to have been intended. Uncertainties as to periods of limitation applicable in different cases having arisen, Parliament settled them by the Act of 1939, but gave over a year for those with rights of action to enforce them. They could protect themselves by suing before the 1st July, 1940. There must be judgment for the defendant.

COUNSEL: *Hanworth; C. L. Henderson.*

SOLICITORS: *Leslie Marrison; W. H. Bellamy,* for *Thomas Coates and Ensor,* Birmingham.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Diamond *v.* Minter and Others.

Cassels, J. 25th February, 1941.

False imprisonment—Plaintiff arrested in mistake for fugitive offender—Police officer acting under provisional warrant in name of actual offender—Reasonable suspicion of offence committed abroad which felonious if committed here—Defence invalid—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), ss. 2, 4.

Action for damages for false imprisonment.

The plaintiff, an Australian subject, was arrested by the second and third defendants, police officers, in London, in the belief that he was one Forbes, also an Australian subject, for whose arrest for conspiracy to defraud in New South Wales a provisional warrant under the Fugitive Offenders Act, 1881, was issued at Bow Street Police Court. The plaintiff was taken by the second and third defendants to Bow Street Police Station, where he was detained by the first defendant, another police officer, who charged him with the offence specified in the warrant. The plaintiff stated at the police station that his name was Diamond, not Forbes. On the afternoon of the arrest the plaintiff was taken before the magistrate at Bow Street Police Court. He pleaded not guilty to the charge, but the magistrate held that there was sufficient evidence to justify his remanding the plaintiff in custody for a week for further inquiry. An application for bail, which the police opposed, having been refused, the plaintiff was taken to Brixton Prison and detained there for some three days, until, his identity having been established, he was again taken before the magistrate and then released. In cables from Bombay and Sydney before the plaintiff's arrest the Metropolitan Police had received information that a man called Forbes, described as of personal appearance somewhat similar to that of the plaintiff on a casual inspection, was "wanted" for conspiracy and forgery in Sydney, had broken bail at Bombay while extradition proceedings were pending, and had left Bombay by air on a certain date under the name of Diamond with a passport of which the number was given. In fact, on his voyage to England, the plaintiff had by chance met Forbes, with whom he was acquainted, at Bombay, and Forbes there stole the plaintiff's passport. At Marseilles, whither Forbes had proceeded by air, he arranged a meeting with the plaintiff by means of an unsigned cablegram, and on the arrival of the plaintiff's ship there confessed that he had stolen the passport at Bombay, and returned the document to him. Before effecting the arrest the second defendant was informed by his superior officer that a warrant had been issued for the arrest of Forbes, but was not told the offence specified in the warrant; that the man believed to be Forbes was "wanted" in Sydney for forgery and conspiracy to defraud; that he was an absconding fugitive; and that the police in London had been asked to arrest him. The second defendant did not communicate that information to the third defendant, who merely acted in obedience to orders. The plaintiff having brought this action, claiming damages for false imprisonment, the defendants contended that they were not liable because they had had reasonable and probable cause for suspecting (*a*) that an offence had been committed outside the United Kingdom which, if committed within it, would be a felony, and (*b*) that the plaintiff was the person who had committed it. A defence under the Constables Protection Act, 1750, was abandoned as the warrant was for the arrest of Forbes, whereas they arrested and detained the plaintiff. (*Cur. adv. vult.*)

CASSELS, J., said that, assuming that the defendants had arrested the plaintiff because they had had reasonable ground to suspect (*a*) that a felony had been committed and (*b*) that the plaintiff had committed it, the common law applicable if the suspected felony had been committed in Great Britain was as stated in "Bullen and Leake's Precedents of Pleadings," 3rd ed. (1868), at p. 795, and as accepted in *Beckwith* v. *Philby* (1827), 6 B. & C. 354; *Davis* v. *Russell* (1829), 5 Bing. 354; *Walters* v. *W. H. Smith & Sons* [1914] 1 K.B. 595, at p. 602; 58 SOL. J. 186; and *McArdle* v. *Egan* (1933), 20 Cox. Crim. Cas. 67. For their proposition relating to the offence committed abroad, the defendants relied on the following *dictum* of Brett, L.J., in *Reg.* v. *Weil* (1882), 9 Q.B.D. 701, at p. 706: "I doubt very much whether a policeman is not justified in arresting a man without warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country." Whether the plaintiff was actually arrested on a warrant because the defendants believed him to be Forbes, or whether he was arrested because the defendants had reasonable grounds for suspecting that he had done something abroad which if done here would be a felony, it was clear that he was arrested as a fugitive offender. The power to make such an arrest was derived solely from the Fugitive Offenders Act, 1881, which provided by s. 4 that a fugitive should be liable to be apprehended and returned under an endorsed or provisional warrant. The warrant here was of the latter kind, and was issued by the magistrate on such information as would justify the issue of a warrant if the offence of which the fugitive was accused had been committed within the magistrate's jurisdiction. Brett, L.J.'s *dictum* was criticised by Sir Francis Piggott at p. 91 of his work on "Extradition" published in 1910. In "Halsbury's Laws of England," Hailsham ed., vol. 14, p. 529, the *dictum* was repeated after the words "it seems." It was referred to in "Clark and Lindsell on Torts" (9th ed., p. 734); but not in "Salmond on Torts" (9th ed.) or "Russell on Crime" (9th ed.). In *Brown* v. *Lyzars* [1905] 2 C.L.R. 837, the Supreme Court of Australia decided in the contrary sense to Brett, L.J.'s *dictum*. He (Cassels, J.) could not follow that *dictum*. The whole matter of the arrest of fugitive offenders depended on the Act of 1881, and the arrest in the present case was not protected, because it was not made in accordance with that Act. If necessary, he would have found as a fact that the defendants did not even arrest and detain the plaintiff because they thought that he had been guilty of an offence which, if committed here, would be a felony. They had, in fact, arrested and detained him on a warrant for the arrest of someone else, namely, Forbes. When arrested the plaintiff was not told that it was for forgery. *Mackalley's Case* (1611), 9 Rep. 118, Resolution 4, and *R.* v. *Howarth* (1828), 1 Moo. Cro. Cas. 20, had been cited for the contention that that omission alone made the arrest unlawful; but he did not decide the case on that ground. An instance of mistaken identity in arrest was *Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364; 74 SOL. J. 299. The plaintiff was entitled to damages for his detention only until the making of the magistrate's order of remand. He would be awarded £110, £50 each against the first and second defendants, and £10 against the third defendant.

COUNSEL: *Valentine Holmes; Geoffrey Howard.*

SOLICITORS: *A. Kramer & Co.; The Solicitor to the Metropolitan Police.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

War Legislation.

(*Supplementary List, in alphabetical order, to those published week by week in* THE SOLICITORS' JOURNAL *from the 16th September, 1939, to the 22nd March, 1941.*)

STATUTORY RULES AND ORDERS, 1941.

E.P. 359. **Control of Communications Order** (No. 1). March 18, 1941.

E.P. 340. **Defence** (General) Regulations, 1939. Order in Council, March 14, 1941, adding Regulations 30A and 65A and amending Regulations 11, 26A and 60C.

E.P. 341. Defence (War Zone Courts) Regulations, 1940. Order in Council, March 14, 1941, amending Regulations 2, 3 and 4.

E.P. 376. **Destruction of Peregrine Falcon Order,** March 13, 1941.

No. 342. **Drainage Authorities** (Extension of Term of Office) Order in Council, March 14, 1941.

No. 312. **Foot and Mouth Disease** (Disinfection of Road Vehicles) Order, February 22, 1941.

No. 305. **Foreign Jurisdiction.** Pacific Order in Council, February 28, 1941.

E.P. 349. **Hay** (Maximum Prices) Order, 1940. Amendment Order, March 13, 1941.

E.P. 354. Hay (Control and Maximum Prices) Order, 1941. General Licence, March 17, 1941.

E.P. 350 Hay (Control and Maximum Prices) Order, March 13, 1941.

E.P. 353. **Jam, Marmalade, Syrup and Treacle** (Control and Distribution) Order, March 15, 1941.

E.P. 323. **Limitation of Supplies** (Woven Textiles) (No. 7) Order, March 15, 1941.

E.P. 348. Limitation of Supplies (Miscellaneous) (No. 8) Order, March 15, 1941.

E.P. 365. Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940, Limitation of Supplies (Woven Textiles) Order, 1940, Limitation of Supplies (Woven Textiles) (No. 7) Order, 1941. General Licence, March 15, 1941.

E.P. 366. Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. General Licence, March 15, 1941.

E.P. 367. Limitation of Supplies (Miscellaneous) (No. 9) Order, March 18, 1941.

E.P. 361. **Livestock** (Restriction on Slaughtering) (Northern Ireland) (No. 2) Order, 1940. Amendment Order, March 18, 1941.

E.P. 364. **Milled Wheaten Substances** (Restriction) Order, 1940. General Licence, March 18, 1941.

E.P. 345. **Nuts** (Maximum Prices) Order, 1941. Amendment Order, March 14, 1941.

E.P. 362. **Oat Products** (Control and Maximum Prices) Order, 1940. General Licence, March 18, 1941.
No. 343. **Port of London Authority** (Extension of Term of office) Order in Council, March 14, 1941.
E.P. 351. **Poultry** (Maximum Prices) Order, 1941. Amendment Order, March 14, 1941.
E.P. 352. **Rabbits** (Maximum Prices) (No. 2) Order, 1941. Amendment Order, March 14, 1941.
E.P. 368. **Registration for Employment Order,** March 15, 1941.
E.P. 363. **Sale of Food** (Public Air Raid Shelters) Order, 1940. Directions, March 18, 1941.
E.P. 321 S.3. **Temporary Constables** (Emergency) (Scotland) Rules, February 28, 1941.
No. 356. **Traffic Signs** (Speed Limit) Regulations, March 5, 1941.
No. 329 S.4. **Wild Birds Protection** (County of Aberdeen) Order, March 1, 1941.
No. 330 S.5. Wild Birds Protection (County of Zetland) Order, March 1, 1941.

[E.P. indicates that the Order is made under Emergency Powers.]

Copies of the above S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Parliamentary News.

Progress of Bills.

Royal Assent.

The following Bills received the Royal Assent on the 26th March:—

Air Raid Precautions (Postponement of Financial Investigation).
Consolidated Fund (No. 2).
Determination of Needs.
Land Drainage (Scotland).
War Damage.

House of Lords.

Liabilities (War-Time Adjustment) Bill [H.L.]
Read Second Time. [25th March.
Ministry of Health Provisional Order (Shipley) Bill [H.C.]
Read Third Time. [25th March.
Public and Other Schools (War Conditions) Bill [H.L.]
Read Third Time. [25th March.

House of Commons.

Army and Air Force (Annual) Bill.
Read Second Time. [25th March.
Great Western Railway (Superannuation Fund) Bill [H.C.]
Reported with Amendments. [25th March.
Great Western Railway (Variation of Directors' Qualification) Bill [H.C.].
Reported with Amendments. [25th March.
Isle of Man (Detention) Bill [H.C.].
Read Second Time. [25th March.
Land Drainage (Provisional Order) Bill [H.C.].
Reported with Amendments. [25th March.
National Service Bill [H.C.].
Read First Time. [19th March.
Public Works Loans Bill [H.C.].
Read Second Time. [25th March.
Southern Railway (Superannuation Fund) Bill [H.C.].
Reported with Amendments. [25th March.

Legal Notes and News.

Notes.

During February there were 1,160 prosecutions under the Food Control Orders, of which 1,104 were successful.

A new division of the Appellate Tribunal, which will hear appeals from conscientious objectors in Wales, has been constituted under the chairmanship of Sir Percy Watkins. Mr. R. Hopkin Morris and Sir Herbert Hiles are the other members.

A whole foolscap sheet was used for a letter of two lines in correspondence produced in the Court of Appeal recently. "I suppose solicitors know there is a shortage of paper," said the Master of the Rolls.

Wills and Bequests.

Mr. Sidney James Miller, solicitor, of Trumpington, and of St. Andrews Street, Cambridge, left £32,487, with net personalty £31,721.

Court Papers.

SUPREME COURT OF JUDICATURE.

Rota of Registrars in Attendance on

Date.	Emergency Rota.	Appeal Court No. I.	Mr. Justice Farwell.
	Mr.	Mr.	Mr.
Mar. 31	More	Andrews	Jones
April 1	Blaker	Jones	Hay.
,, 2	Andrews	Hay	More
,, 3	Jones	More	Blaker
,, 4	Hay	Blaker	Andrews
,, 5	More	Andrews	Jones

	Group A.		Group B.	
	Mr. Justice Bennett. Non-Witness.	Mr. Justice Simonds. Witness.	Mr. Justice Uthwatt. Non-Witness.	Mr. Justice Morton. Witness.
	Mr.	Mr.	Mr.	Mr.
Mar. 31	Blaker	Andrews	Hay	More
April 1	Andrews	Jones	More	Blaker
,, 2	Jones	Hay	Blaker	Andrews
,, 3	Hay	More	Andrews	Jones
,, 4	More	Blaker	Jones	Hay
,, 5	Blaker	Andrews	Hay	More

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 3rd April, 1941.

	Div. Months.	Middle Price 26 Mar. 1941.	Flat Interest Yield.	† Approximate Yield with redemption.
			£ s. d.	£ s. d.
ENGLISH GOVERNMENT SECURITIES.				
Consols 4% 1957 or after	FA	110⅜	3 12 3	3 2 9
Consols 2½%	JAJO	78	3 4 1	—
War Loan 3½% 1955–59	AO	106½	2 19 8	2 19 1
War Loan 3½% 1952 or after	JD	104⅝	3 6 11	3 0 9
Funding 4% Loan 1960–90	MN	112¾xd	3 11 0	3 2 0
Funding 3% Loan 1959–69	AO	99	3 0 7	3 1 1
Funding 2½% Loan 1952–57	JD	98½	2 15 10	2 17 4
Funding 2½% Loan 1956–61	AO	92	2 14 4	3 0 8
Victory 4% Loan Average life 20 years	MS	111	3 12 1	3 4 10
Conversion 5% Loan 1944–64	MN	106⅝xd	3 14 1	2 15 0
Conversion 3½% Loan 1961 or after	AO	104	3 7 4	3 4 6
Conversion 3% Loan 1948–53	MS	102	2 18 10	2 13 2
Conversion 2½% Loan 1944–49	AO	99½	2 10 4	2 12 2
National Defence Loan 3% 1954–58	JJ	101½	2 19 1	2 17 3
Local Loans 3% Stock 1912 or after	JAJO	90⅜	3 6 1	—
Bank Stock	AO	352½xd	3 8 1	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	91	3 5 11	—
Guaranteed 2½% Stock (Irish Land Act, 1903)	JJ	84	3 5 6	—
Redemption 3% 1986–96	AO	95	3 3 2	3 3 10
Sudan 4½% 1939–73 Average life 18½ years	FA	110	4 1 10	3 14 9
Sudan 4% 1974 Red. in part after 1950	MN	108	3 14 1	3 0 3
Tanganyika 4% Guaranteed 1951–71	FA	109	3 13 5	2 18 11
Lon. Elec. T. F. Corpn. 2½% 1950–55	FA	94	2 13 2	3 0 0
COLONIAL SECURITIES.				
*Australia (Commonwealth) 4% 1955–70	JJ	105	3 16 2	3 10 11
Australia (Commonwealth) 3½% 1964–74	JJ	94	3 9 2	3 11 3
Australia (Commonwealth) 3% 1955–58	AO	93	3 4 6	3 10 7
*Canada 4% 1953–58	MS	110	3 12 9	2 19 11
New South Wales 3½% 1930–50	JJ	99	3 10 8	3 12 6
New Zealand 3% 1945	AO	98	3 1 3	3 10 10
Nigeria 4% 1963	AO	106	3 15 6	3 12 2
Queensland 3½% 1950–70	JJ	99	3 10 8	3 11 1
*South Africa 3½% 1953–73	JD	102	3 8 8	3 6 0
Victoria 3½% 1929–49	AO	99	3 10 8	3 12 8
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	84½	3 11 0	—
Croydon 3% 1940–60	AO	92	3 5 3	3 11 10
Leeds 3½% 1958–62	JJ	97	3 7 0	3 9 1
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	96	3 12 11	—
London County 3% Consolidated Stock after 1920 at option of Corporation	MJSD	88	3 8 2	—
*London County 3½% 1954–59	FA	103	3 8 0	3 4 0
Manchester 3% 1941 or after	FA	84	3 11 5	—
Manchester 3% 1958–63	AO	92½	3 4 10	3 9 7
Metropolitan Consolidated 2½% 1920–49	MJSD	98	2 11 0	2 15 1
Met. Water Board 3% "A" 1963–2003	AO	88	3 8 2	3 9 5
Do. do. 3% "B" 1934–2003	MS	90	3 6 8	3 7 8
Do. do. 3% "E" 1953–73	JJ	92	3 5 3	3 8 3
Middlesex County Council 3% 1961–66	MS	94	3 3 10	3 7 2
*Middlesex County Council 4½% 1950–70	MN	107	4 4 1	3 10 7
Nottingham 3% Irredeemable	MN	83	3 12 3	—
Sheffield Corporation 3½% 1968	JJ	101	3 9 4	3 8 10
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture	JJ	107½	3 14 5	—
Great Western Rly. 4½% Debenture	JJ	115½	3 17 11	—
Great Western Rly 5% Debenture	JJ	124½	4 0 4	—
Great Western Rly. 5% Rent Charge	FA	122½	4 1 8	—
Great Western Rly. 5% Cons. Guaranteed	MA	121½	4 2 4	—
Great Western Rly. 5% Preference	MA	90½	5 10 6	—

*Not available to Trustees over par.
† In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.